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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2615-17T3

MARK EMME,

Plaintiff,

v.

JEFFERSON PROPERTIES
MANAGEMENT AND DEVELOPMENT
LLC, and CARMINE FORNARO,

Defendants.

JEFFERSON PROPERTIES
MANAGEMENT AND DEVELOPMENT LLC
and CARMINE FORNARO,

Third-Party
Plaintiffs-Respondents,

v.

SAMUEL PAGLIANITE,

Third-Party
Defendant-Appellant,

and

NARSAN LINGALA,
MOSHE VAKNEEN and THE DIMENSIONAL
DYNAMICS, CORP., INC.,

Third-Party Defendants.

Submitted May 17, 2018 – Decided May 31, 2018

Before Judges Simonelli and Haas.

On appeal from Superior Court of New Jersey,
Law Division, Morris County, Docket No.
L-2489-16.

Graziano & Campi, LLC, attorneys for appellant
(Ryan Patrick Campi, on the brief).

Clifford J. Weininger, attorney for respondents
(Steven H. Wolff, on the brief).

PER CURIAM

By leave granted, third-party defendant Samuel Paglianite appeals from the Law Division's December 6, 2017 order granting third-party plaintiffs Jefferson Properties Management and Development LLC (Jefferson) and Carmine Fornaro (collectively plaintiffs') motion to disqualify the law firm of Graziano and Campi, LLC (the law firm) from representing Paglianite in this dispute over a commercial lease. Because the trial judge failed to conduct a plenary hearing to resolve the parties' sharply conflicting factual assertions concerning the nature and extent of the legal representation, if any, previously provided by one of the principals of the law firm, Alexander Graziano, Esq., to Jefferson and Fornaro, and neglected to make any meaningful findings of fact or conclusions of law, we are constrained to reverse and remand for further proceedings.

In their third-party complaint, plaintiffs alleged that Dimensional Dynamics, Inc., a company previously owned by Paglianite, failed to make lease payments to Jefferson. Plaintiffs are pursuing Paglianite individually for these payments based upon their claim that he orally guaranteed payment.

Paglianite and Fornaro are former business partners. In 2004, they formed a company called Merrywood Development LLC (Merrywood). However, that company is not involved in the commercial lease that is the focus of the current litigation. Paglianite and Fornaro were also partners in Jefferson. In 2009 or 2010, Paglianite transferred his interest in Jefferson to Fornaro.

As the litigation progressed, plaintiffs filed a motion to disqualify the law firm from representing Paglianite. In a certification in support of this motion, Fornaro asserted that Graziano, a principal in the law firm, represented Fornaro and Paglianite as individuals in the formation of both Merrywood and Jefferson and, thereafter, continued to represent the partners and their two business entities. Fornaro claimed that Graziano was the only attorney he "ever dealt with or met with" in connection with the businesses and that he "had at least one meeting" with Graziano to discuss various unspecified issues. Fornaro also stated that during the course of their alleged relationship,

Graziano became "privy to facts only a lawyer would know, and those facts can now be used to my detriment."

Paglianite strongly opposed plaintiffs' motion to disqualify the law firm. In an accompanying certification, Graziano asserted that he had been representing Paglianite "for nearly two decades." He stated he never represented Fornaro personally, and he previously represented Merrywood and Jefferson solely as business entities in real estate and mortgage transactions. Contrary to Fornaro's claims, Graziano maintained he was not involved in the formation of either of these companies. Instead, Paglianite brought business directly to Graziano, and all of his legal work with the companies was done through Paglianite.

Graziano also confirmed he never provided any legal services in connection with the commercial lease that is the subject of the parties' current dispute, and provided no representation to Jefferson after Paglianite transferred his interest to Fornaro sometime in 2009 or 2010. Graziano also denied ever receiving any confidential information of any kind from Fornaro.

With these competing factual allegations in mind, we now set forth the legal standards the trial judge was required to apply in resolving the issue of whether the law firm had to be disqualified from representing Paglianite in connection with plaintiffs' third-party complaint against him. This question is

controlled by our Rules of Professional Conduct, specifically R.P.C. 1.9(a), which provides:

A lawyer who has represented a client in a matter shall not thereafter represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing.

This prohibition "is triggered when two factors coalesce: the matters between the present and former clients must be 'the same or . . . substantially related,' and the interests of the present and former clients must be 'materially adverse.'" City of Atlantic City v. Trupos, 201 N.J. 447, 462 (2010) (alteration in original).

[M]atters are deemed to be "substantially related" if (1) the lawyer for whom disqualification is sought received confidential information from the former client that can be used against that client in the subsequent representation of parties adverse to the former client, or (2) facts relevant to the prior representation are both relevant and material to the subsequent representation.

[Id. at 451-52.]

Obviously, the former client must also demonstrate that he or she "previously had been represented by the attorney whose disqualification is sought." Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 222 (1988). With particular significance to the

present case, prior representation by an attorney of a business entity does not automatically translate into representation of the individual members of that entity. In this regard, R.P.C. 1.13(a) provides that "[a] lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents." This "rule does not specifically provide for any exceptions simply because the corporation is closely held." McCarthy v. John T. Henderson, Inc., 246 N.J. Super. 225, 230 (App. Div. 1991).

The former client bears the burden of proving that the prohibition of R.P.C. 1.9(a) applies. Trupos, 201 N.J. at 462. In order to demonstrate that the lawyer came into possession of confidential information from the prior relationship, the former client must make more than "bald and unsubstantiated assertions" that he or she disclosed "business, financial and legal information" that the client believes might be related to the matter for which the disqualification of the attorney is sought. O Builders & Assocs., Inc. v. Yuna Corp. of NJ, 206 N.J. 109, 129 (2011).

If the former client comes forward with prima facie proof of a possible ground for disqualification, the burden of producing countervailing evidence shifts to the attorney and his or her

present client. Trupos, 201 N.J. at 462-63. Disqualification motions should normally be decided based on affidavits or other documentary evidence, unless live testimony is clearly required because conflicting affidavits are presented and witness credibility is at issue. Id. at 463 (citing Dewey, 109 N.J. at 222).

Unfortunately, the trial judge did not apply these standards in the case at hand. Despite the clearly contradictory certifications presented by Fornaro and Graziano, the judge did not conduct a plenary hearing so that credibility determinations could be made on the question of whether Graziano formerly represented Fornaro on a personal basis, the scope of that alleged representation, and the nature of any confidential information that may have been disclosed.

Instead, the judge merely rendered a very short oral decision after conducting oral argument. While the judge cited R.P.C. 1.9(a), he provided no reasoned analysis of the rule or of the case law construing it. The judge simply found "there was a relationship" between Fornaro and Graziano, but did not provide any specific information concerning what that relationship entailed, other than stating, "Money exchanged hands. This was a serious development. A lot of money. It wasn't a simple[,] oh we formed a corporation."

The judge made no findings whatsoever on the critical question of whether the dispute over the commercial lease was "substantially related" to any matter where Graziano formerly represented Fornaro, Merrywood, or Jefferson. The judge also did not address the nature and extent of any "confidential information" that Fornaro may have provided Graziano in the past. Nevertheless, the judge granted plaintiffs' motion to disqualify the law firm from representing Paglianite in the litigation concerning the lease.

We granted Paglianite's motion for leave to appeal and, on appeal, he argues the judge erred by disqualifying the law firm, primarily because the judge failed to make any findings supporting his decision. We agree.

"[A] determination of whether counsel should be disqualified is, as an issue of law, subject to de novo plenary appellate review." Trupos, 201 N.J. at 463. However, we are unable to conduct this review because the trial judge ignored his duty to make adequate findings of fact and conclusions of law.

No one – not the parties and not this court – can properly function or proceed without some understanding of why a judge has rendered a particular ruling. See Curtis v. Finneran, 83 N.J. 563, 569–70 (1980) (requiring trial court to clearly state its factual findings and correlate them with the relevant legal conclusions). The failure to provide findings of fact and

conclusions of law "constitutes a disservice to the litigants, the attorneys and the appellate court." Ibid. (quoting Kenwood Assocs. v. Bd. of Adjustment, Englewood, 141 N.J. Super. 1, 4 (App. Div. 1976)). As our colleague, Judge Jose Fuentes, recently stated, "our function as an appellate court is to review the decision of the trial court, not to decide the motion tabula rasa." Estate of Doerfler v. Federal Ins. Co., ___ N.J. Super. ___ (App. Div. 2018) (slip op. at 5).


Because the judge did not make any findings of fact or reasoned conclusions of law, we are unable to determine the precise nature of Graziano's alleged prior attorney-client relationship with Fornaro, the scope of any confidential information Fornaro may have provided to Graziano, or whether anything about Graziano's purported relationship with Fornaro or Jefferson was "substantially related" to the dispute about the commercial lease. Under these circumstances, we have no alternative but to remand this matter to the trial court.

On remand, the trial court must conduct a plenary hearing on all relevant issues. A hearing is necessary because the parties' certifications completely contradicted each other on the questions of whether Graziano ever represented Fornaro and, if so, what confidential information Fornaro provided him. "[I]n a variety of contexts, courts have opined on the impermissibility of deciding

contested issues of fact on the basis of conflicting affidavits or certifications alone." State v. Pyatt, 316 N.J. Super. 46, 50 (App. Div. 1998) (citations omitted). In particular, where the papers, as here, raise issues of fact or require credibility determinations, relief cannot be granted or denied absent a plenary hearing. Trupos, 201 N.J. at 463.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION